The respondents are entitled to the costs of the appeal and the deposit of $500.00 lodged in court in connection with the appeal must be paid to them on account of taxed costs.

Appeal dismissed.

Solicitors: *Nahappan, Peri & Partners; Abdul Aziz, Ong & Co.*

PUBLIC PROSECUTOR v. NORDIN BIN JOHAN & ANOR.

[F.C. (Raja Azlan Shah L.P., Abdul Hamid & Abdoolcader F.JJ.) June 7 to 9, 1983]

[Kuala Lumpur – Federal Court Criminal Appeal No. 2 of 1983]

Criminal Law & Procedure – Charge of murder – Common intention – Accused acquitted by trial judge at end of prosecution case – Appeal on ground that trial judge drew wrong inferences from facts – Whether trial judge in security case bound to call on defence at end of prosecution case – Statement by co-accused – May be taken into consideration but there must some other cogent evidence – Question of fact – Approach of appellate court – Evidence Act, 1950, s. 30 – Penal Code, s. 34.

Evidence – Statement by co-accused – May be taken into consideration against accused but there must be some other cogent evidence – Evidence Act, 1950, s. 30.

In this case the respondents were jointly charged with some other persons for murder. The respondents were acquitted by the trial judge at the end of the prosecution case. The Public Prosecutor appealed and it was argued (a) that the learned trial judge had drawn wrong inferences from the facts as found and accepted by him; (b) that the provisions of the Essential (Security Cases) Regulations, 1975 mandatorily require the defence to be called in every case when the prosecution case is closed, notwithstanding the absence of a *prima facie* case; (c) that the learned trial judge failed to give due weight to the statement of the co-accused in the case.

Held: (1) in a security case the court is not obliged at the end of the prosecution case to call on the accused to enter on his unless the prosecution has then proved a *prima facie* case against him;

(2) in this case the statement of the co-accused may be taken into consideration against the accused but the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the co-accused;

(3) the nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must be a factual matter in the context and circumstances of the particular case;

(4) the approach of an appellate court in a case like this is well established. In such a case it is its duty to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly;

(5) in this case on the basis of the facts which the learned judge had found and accepted, his decision was one which any reasonable tribunal properly directed could have reached;

(6) the evidence against the respondents in this case, apart from the confession of the co-accused, was not sufficient to satisfy the requirements of the charge against them and calling on their defence would not only go beyond taking into consideration the co-accused's statement but be tantamount to virtually relying on it to an extent that would not be permissible for the purposes of section 30 of the Evidence Act 1950.

Case referred to:

(1) *Public Prosecutor* v. *Sihabduin* [1980] 2 M.L.J. 273.

FEDERAL COURT.

Tan Sri Abu Talib bin Othman, Attorney-General (*Lim Beng Choon,* Senior Federal Counsel and *T. S. Sambanthamurthi,* Senior Federal Counsel with him) for the appellant.

Sri Ram (*V. Balasingam* and *Zulkifly Rafique* with him) for respondent No. 1.

James Ponniah for respondent No. 2.

Cur. Adv. Vult.

Raja Azlan Shah L.P. (delivering the Judgment of the Court): An elaborate argument has been addressed to us by the Public Prosecutor on one vital point which is said to afford a ground for impugning the decision of the learned trial judge, the point being that he drew wrong inferences from the facts as found and accepted by him.

We have been urged by the Public Prosecutor in this appeal against the acquittal of the 2 respondents to review and disapprove the decision of this court in *Public Prosecutor* v. *Sihabduin*[1] which held by majority that in a security case at the end of the prosecution case the court is not obliged to call on the accused to enter on his defence unless the prosecution has then proved a *prima facie* case against him, and to hold that the provisions of the Essential (Security Cases) Regulations, 1975 mandatorily require the defence to be called in every case when the prosecution case is closed, notwithstanding the absence of a

prima facie case. We do not demur in substance from the view of the law as expressed by Suffian, L.P. In our opinion it is supported not only by good sense but by those considerations of justice and fair play as one would expect to find in an adversary system of trial which we practise in this country.

This leaves the question of the application of the provisions of section 30 of the Evidence Act 1950 in relation to the 2 respondents as a result of the statement made by Rahmat Satiman, the 3rd accused in these proceedings, which was admitted and accepted and which clearly implicates the 2 respondents. Section 30 provides that this statement may be taken into consideration against the 2 respondents but on the decided authorities the prerequisite to this is that there must be some cogent evidence against them quite apart from the statement of the 3rd accused. The nature of this evidence which would be extraneous to the confession of a co-accused and its qualitative and probative value in relation to the charge must *ex necessitate rei* be a factual matter in the context and circumstances of the particular case.

Having considered the evidence against the 2 respondents which is fairly voluminous and lengthy, the learned judge came to the conclusion that it did not in relation to them have any real probative value to the charge and even taken as a whole did not take the prosecution case anywhere for the purposes of proving common intention under section 34 of the Penal Code. The learned trial judge had opportunities which are denied to us of considering whether it would be safe to draw the inference that the 2 respondents were present at the scene of the crime and participated in the commission of the offence. He said:

"Does the totality of the evidence against the second accused and the fourth accused excluding the confession (P101) lead the court to the irresistible inference that they were present at the scene of the crime and participated in the commission of the offence? I am afraid I am unable to honestly give an affirmative answer to this question."

The approach of an appellate court in a case like this is well established. In such a case it is its duty to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly.

The question as it seems to us is whether the learned trial judge was reasonably entitled in all the circumstances to come to the conclusion he did that the 2 respondents were not at the scene of the crime and were not *participes criminis* in respect of the actual crime charged. We would answer that question in this way: that on the basis of the facts which the learned judge had found and accepted, his decision was one which any reasonable tribunal properly directed, as was done in this case, could have reached and we do not think that we ought to accede to the Public Prosecutor's argument that certain adverse inferences should be made on the evidence adduced.

On a considered view of the case we find no justification to warrant interference with the learned trial judge's conclusion in this matter. We are satisfied that the evidence against the 2 respondents, apart from the 3rd accused's confession, was not sufficient to satisfy the requirements of the charge against them and that calling on their defence would on the authorities not only go beyond taking into consideration the 3rd accused's statement but be tantamount to virtually relying on it to an extent that would not be permissible for the purposes of section 30 of the Evidence Act.

We would accordingly in the circumstances dismiss this appeal by the Public Prosecutor.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Stanley Ponniah, Ng & Soo.*

SONG LIAN CHYE & ORS. v. TAI KIAN CHEONG t/a TAI KIAN CHEONG & CO.

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) February 21 & June 25, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 110 of 1983]

Contract – Contract for sale of building lots – Whether contract for sale of land only or for purchase of land and house – Failure to complete payments – Specific performance refused – Deposits not refundable.

In this case the appellants orally agreed to purchase building lots and they paid the deposits of $3000/– and